IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

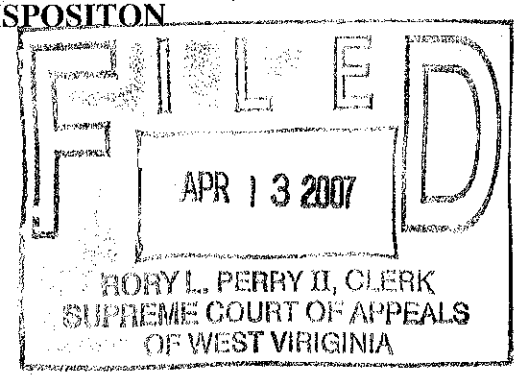
IN THE INTEREST OF:

CESAR ALEJANDRO L., Infant

Docket No. 33317
Berkeley County Abuse & Neglect
Case No. 05-JA-10

TAMEKA LYNETT M., Mother
LOIS ALBERTO L., Father
Respondents

GUARDIAN *AD LITEM'S* OPPOSITION TO TAMEKA M.'S REQUEST FOR MODIFICATION OF DISPOSITON



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II. STATEMENT OF CASE, AND NATURE OF RULING BELOW

This case presents the issue of whether an individual whose parental rights have been terminated, pursuant to the individual's voluntary relinquishment, has standing to ask that the case be reopened and the child be returned to her due to an alleged change in her circumstances[1], without first showing that the relinquishment was procured by fraud or duress[2]. In this case, Ms. M. voluntarily relinquished her parental rights to Cesar M. while she was incarcerated in the State of Virginia. The Mother's relinquishment was dated September 29, 2005, and was accepted by the Berkeley County Circuit Court on November 30, 2005[3]. Subsequently, on June 15, 2006, more than 8 months after her relinquishment was signed, Ms. M. sought to withdraw her relinquishment and have the same ignored, alleging, in part, that as she was no longer incarcerated, there had been a change of her circumstances which should allow her to reopen this case and have Cesar returned to her.

This Guardian believes that the Berkeley County Circuit Court correctly denied Ms. M.'s motion to reopen. This decision was based in part on the Court's finding that Ms. M.'s relinquishment of parental rights was knowingly and voluntarily made, after Ms. M. was fully informed of the consequences of a relinquishment and termination of

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[1] This is pursuant to W.Va. Code Sec. 49-6-6, that "[u]pon motion of a child, a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to . . .[49-6-2]. . .and may modify a dispositional order".

[2] This is pursuant to W.Va. Code Sec. 49-6-7, that "[a]n agreement of a natural parent in a termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud."

[3] The underlying allegations against Ms. M. involved drug abuse, as Cesar was born on February 23, 2005, testing positive for marijuana and amphetamines. Further, the case against Ms. M. involved aggravated circumstances, as the mother's parental rights to three siblings had previously been involuntarily terminated in Berkeley County Circuit Court in Case Nos. 00-JA-30, 00-JA-31, and 02-JA-71

parental rights[4]. The Court also found that allowing Ms. M. to reopen now unfairly delays permanency for Cesar, as Cesar has been in the home of Betty M. since June, 2005, a relative placement picked by Ms. M. for this Infant, and a home where Cesar is loved and has bonded. The permanency plan for this Infant is to remain in this home.

This Guardian also believes that the sort of intervention attempted here by Ms. M. is unfair to the Infant and to the court process, that it has no basis in law, and that it turns this Court's directive that abuse and neglect cases be resolved in a timely manner on its head. Absent fraud or duress, an individual who has voluntarily relinquished parental rights has no legal right to come back into court and attempt to undo her relinquishment, simply because she has changed her mind, as the result will always be to delay permanency for the Infant. Here, Ms. M. knowingly and voluntarily gave up her parental rights to Cesar, in a sworn document, filed with the Court, in which she admitted that it was in Cesar's "best interests. . .to remain in the custody of the West Virginia Department of Health and Human Resources" (Relinquishment Document, paragraph 1). Ms. M. has no right to undo her own words, or to attempt to reenter the life of a child who does not even know her. Further, there is no legal reason, under these circumstances, for a court to even have to consider removing this Infant from the only home that he has ever known.

Based thereon, this Guardian respectfully requests that Ms. M.'s appeal be denied.

III. STATEMENT OF FACTS

1. This case began on March 3, 2005, when D.H.H.R. filed its petition alleging that Cesar was born to Ms. M. on February 23, 2005, and that Ms. M.'s parental

[4] There is no dispute that the Circuit Court fully complied with all requirements of Rule 35 of the Rules of Procedure for Child Abuse and Neglect.

rights to three other children had been previously involuntarily terminated by the Circuit Court of Berkeley County. These terminations occurred in Case Nos. 00-JA-30 and 31 on August 24, 2001, for abandonment, and in Case No. 02-JA-71 on November 26, 2002. due to aggravated circumstances and the Mother's incarceration. Cesar's petition also alleged that the prior cases included allegations of the Mother's drug abuse, inadequate housing, lack of employment, and lack of cooperation in previous improvement periods.

2. On March 14, 2005, Ms. M. waived her right to a preliminary hearing, and, based thereon, the Order of Temporary Custody, dated March 3, 2005. granting D.H.H.R. custody of Cesar, was confirmed and ratified.

3. On March 17, 2005, an amended petition was filed, which contained the additional allegation that at the time of Cesar's birth, Ms. M. and Cesar tested positive for marijuana and amphetamines.

4. Thereafter, Ms. M. filed an answer in this case, admitting that she abused drugs and that this was an aggravated circumstances case. As a result, on May 25, 2005. Cesar was adjudicated to be an abused and neglected child as those terms are defined under West Virginia law.

5. Cesar had been removed from Ms. M.'s custody at birth, and had been placed in foster care. However, because Ms. M. was not happy with this arrangement, she asked that D.H.H.R. place Cesar with her relative, Betty M. D.H.H.R. consented to this request, and Cesar was moved to Betty M.'s home in late May or early June, 2005.

6. An MDT was held in this case on May 14, 2005, and the possibility of giving Ms. M. an improvement period was discussed. This was considered, even though this was an aggravated circumstances case. The parties believed that Ms. M's issues

primarily stemmed from drug abuse, and hoped that if she participated in drug treatment her problems would resolve. Ms. M. did agree to participate in drug treatment at F.M.R.S in Beckley, WV, and she went to this program in June of 2005. This was reported at the June 30, 2005, hearing held before the Court.

7. However, when Ms. M. presented herself at the F.M.R.S. facility, she was arrested on a warrant from the State of Virginia. The basis of this warrant was a felony forgery charge.

8. On June 30, 2005, the parties did not know how long Ms. M. would be incarcerated, and there was agreement to defer her disposition until the next hearing. Disposition was again deferred on July 20, 2005, August 25, 2005, and September 29, 2005, because of Ms. M.'s continued incarceration. Due to this incarceration, Ms. M. was never given an improvement period.

9. During this time, it became obvious to all parties that Ms. M. would not be released in a timely manner consistent with permanency for Cesar. This Guardian raised this issue at all of the hearings held during the summer of 2005.

10. Thus, on October 6, 2005, but on her own volition, Ms. M. filed her sworn Relinquishment of Parental Rights, which complied with the Requirements of Rule 35 of the Rules of Procedure for Child Abuse and Neglect, and her parental rights to Cesar were terminated by Order of this Court dated November 30, 2005. The text of this relinquishment is set forth in the margin[5].

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[5] I, Tameka M. L., the Respondent Mother of Cesar Alejandro L., date of birth February 23, 2005, after thoughtful consideration of this matter, hereby acknowledge the following:

1. That I believe it is in the best interest of Cesar Alejandro Lopez to remain in the custody of the West Virginia Department of Health and Human Resources;

2. I understand that I am entitled to be represented by counsel at all proceedings.

3. Heidi J. Myers has been appointed by this Honorable Court to represent my interests at these hearings.

11. At the hearing on November 30, 2005, before Ms. M.'s relinquishment was accepted, the Court inquired of Ms. M.'s counsel, to determine if counsel believed that Ms. M. understood the consequences of a termination of parental rights, was aware of less drastic alternatives than termination, and was informed of the right to a hearing and to representation of counsel. The Court also inquired concerning the substance of counsel's conversations with Ms. M., which were recounted on the record, and counsel stated her belief that Ms. M. understood the consequences of her relinquishment and that her actions were knowing and voluntary. After this inquiry, the Court determined that the relinquishment was Ms. M.'s free and voluntary act, and that Ms. M. understood all of

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4. I understand that I would be entitled to call witnesses, present evidence, testify on my own behalf, and have my attorney cross-examine any witnesses called at any hearing held in this matter.

5. I wish to waive my right to an adjudication and dispositional hearing in this matter and voluntarily relinquish all my parental rights to Cesar Alejandro L..

6. I understand the Court would consider less drastic alternatives to termination, such as granting a pre or post adjudicatory improvement period, returning the child into my custody or simply having custody remain with the West Virginia Department of Health and Human Resources.

7. I fully understand the consequences of this decision. I understand my decision will result in the termination of my parental rights as to Cesar Alejandro Lopez.

8. I understand that I have no right to custody or visitation in this matter, but request at this time that visitation be afforded to me in the future.

9. I understand that I will have no right to participate in the care, custody, control, education, training or any aspect of raising Cesar Alejandro L. from this point forward.

10. I understand by relinquishing parental rights to Cesar Alejandro L. that it is a final disposition as towards custody and therefore I leave the Court no less restrictive alternative or option other than termination of my parental rights.

11. I understand that I am authorizing West Virginia Department of Health and Human Resources to consent to the adoption of Cesar Alejandro L., the right to change his name and I understand that I am waiving notice as to these proceedings.

12. I have read and discussed thoroughly with my attorney all the above mentioned rights.

13. I fully understand the meaning and consequences of executing this document.

14. I have not been induced, coerced or threatened into signing this document.

15. No promises or rewards have been offered in consideration for my execution of this document.

I hereby freely, knowingly, intelligently and voluntarily relinquish all my parental rights to Cesar Alejandro L.

s/ Tameka M. L.

State of Virginia
County of Loudoun, To Wit,

The foregoing instrument was acknowledged before me this 29th day of September, 2005, by Tameka M. L..

s/ Duy Huu Nguyen
Notary Public

My Commission Expires June 10, 2009.

her rights associated therewith. Therefore, the relinquishment was accepted, and Ms. M.'s parental rights to Cesar were terminated.

12. Significant in the sworn relinquishment document are the following statements made by Ms. M.:

> . . . 1. That I believe it is in the best interest of Cesar Alejandro L[] to remain in the custody of the West Virginia Department of Health and Human Resources;. . .
>
> 5. I wish to waive my right to an adjudication and dispositional hearing in this matter and voluntarily relinquish all my parental rights to Cesar Alejandro L. . .
>
> 7. I fully understand the consequences of this decision. I understand my decision will result in the termination of my parental rights as to Cesar Alejandro L. . .
>
> 10. I understand by relinquishing parental rights to Cesar Alejandro L. that it is a final disposition as towards custody and therefore I leave the Court no less restrictive alternative or option other than termination of my parental rights. . .
>
> 12. I have read and discussed thoroughly with my attorney all the above mentioned rights.
>
> 13. I fully understand the meaning and consequences of executing this document.
>
> 14. I have not been induced, coerced or threatened into signing this document. . .
>
> I hereby freely, knowingly, intelligently and voluntarily relinquish all my parental rights to Cesar Alejandro L.
>
> s/ Tameka M. L.

13. Subsequently, during the spring of 2006, Ms. M. was apparently released from incarceration in Virginia, and on June 15th, 2006 she filed what the Circuit Court took as her motion to reopen this case pursuant to W.Va. Code Sec. 49-6-6, alleging that as she was no longer incarcerated, there was a change of circumstances which should

allow her to reopen this case and have Cesar returned to her. This was scheduled for a hearing on August 30, 2006.

14. At the August 30 hearing, this Guardian argued that Ms. M.'s Sec. 49-6-6 Motion was barred, as Ms. M. did not have standing under 49-6-6 to bring this Motion. This is because, after termination of her parental rights, Ms. M. was not within the class of individuals given standing under 49-6-6 to allege that a change of circumstances required a different disposition in the case. This did not leave her without recourse, however, as Ms. M. could still bring a motion under W.Va. Code Sec. 49-6-7, asking that her relinquishment be withdrawn, if she could prove that it was obtained by fraud or duress.

15. The Court accepted this Guardian's position, and required Ms. M. to submit an affidavit setting forth the basis of her 49-6-7 Motion, including specific allegations of fraud or duress. Order of October 11, 2006.

16. Subsequently, on October 4, 2006, Ms. M. filed her affidavit, with the text set forth in the margin[6], in which she alleged, among other claims, that counsel did not explain the relinquishment to her.

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[6] Now comes Tameka Lynette L., and first being duly sworn, deposes and states the following:

1. That I relinquished my rights to my son Cesar L. under duress.
2. I was incarcerated at the time of any relinquishment in the State of Virginia.
3. That my attorney at the time Heidi Myers did not explain the relinquishment to me. I only spoke with her secretary once, and then a block was put on any further calls. Heidi Myers sent a form down for me to sign but no letter explaining it.
4. The secretary at the Myers Law Office informed me that if I did not relinquish I would be terminated from my son and then I could not get him back.
5. That it would be in the best interests of my child Cesar L. for the relinquishment to be set aside; that is the polar star to follow. I desire to be reunited with my son.
6. I am willing to testify further about this matter in Court and under oath.

And further you [sic] affiant sayeth not. . .

s./ Tameka Lynette L.

Taken, subscribed and sworn or affirmed before me this 4th day of October, 2006, by Tameka L.

s./ Notary

My commission expires December 1, 2013.

17. At a hearing held on November 29, 2006, the Circuit Court found that the statements made in Ms. M.'s affidavit directly contradicted the statements contained in her relinquishment of parental rights; further, that the statements did not rise to the legal standard of fraud or duress required before a relinquishment of parental rights can be withdrawn.

18. Based thereon, the Court denied Ms. M.'s Motion to withdraw her relinquishment. Order of December 14, 2006. Ms. M.'s appeal followed.

IV. STANDARD OF REVIEW

The circuit court's conclusions of law in an abuse and neglect proceeding are reviewed de novo, although its findings shall be upheld unless clearly erroneous. *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

V. LEGAL ARGUMENT

1. MS. M. LOST STANDING TO ASK THAT HER CASE BE REOPENED PURSUANT TO W.VA. CODE SEC. 49-6-6 WHEN HER PARENTAL RIGHTS TO CESAR WERE TERMINATED

Ms. M. asked that the Circuit Court consider reinstatement of her parental rights pursuant to W.Va. Code Sec. 49-6-6, which allows for modification of a dispositional order in an abuse and neglect case upon ". . .motion of a child, a child's parent or custodian or the state department alleging a change of circumstances. . .".

Here, when Ms. M.'s parental rights were terminated, her legal relationship as a "parent" to Cesar was severed and terminated. Therefore, under the plain meaning of 49-6-6, Ms. M. does not have standing to ask for the relief requested.

The fact that relinquishment and termination of parental rights severs the parent child relationship has been recognized several times by this Court. Thus, in *In re James*

G., 211 W.Va. 339, 345, 566 S.E.2d 226 (2002), this Court found that with relinquishment of parental rights, a child's "legal relationship with [his] mother. . . [is] severed." See, also, *Alonzo v. Adult*, 191 W.Va. 248, 250, 445 S.E.2d 189, (1994), that the relinquishment of parental rights contemplated by W.Va. Code Sec. 49-6-7 "is designed to permit a parent charged with abuse and neglect to surrender his parental rights to the Department rather than contest the charges".

An almost identical issue of statutory construction was resolved in *Elmer Jimmy S. v. Kenneth B.*, 199 W.Va. 263, 267, 483 S.E.2d 846 (1997). In this case, involving grandparent visitation, the Supreme Court considered language then contained in W.Va. Code Sec. 48-2B-3(a)(1). The issue was whether an individual whose parental rights to an infant had been terminated would fit within the definition of "noncustodial parent", allowing grandparent visitation to occur. Under this section[7], before a grandparent could get visitation, the ". . .parent through whom the grandparent is related to the grandchild

[7] This section how now changed and has different requirements for standing for grandparents in grandparent visitation cases. At the time, the language of 48-2B-3 (1992, Rpl. Vol. 1996), was as follows:

> (a) A grandparent may petition a circuit court, which has entered a final order of divorce or annulment or has granted a decree of separate maintenance, for an order granting visitation rights with a minor grandchild where:
>
> (1) The parent through whom the grandparent is related to the minor grandchild is deemed the noncustodial parent of the minor child by virtue of the court's order regarding custody of the minor child;
>
> (2) The parent through whom the grandparent is related to the minor child having been granted visitation rights with the minor child refuses, fails or is unable to avail himself or herself of the right of visitation for a period of six months or more or has been precluded visitation rights by court order, or is an active duty member of the armed forces of the United States whose permanent duty station is located more than one hundred miles from the border of this state; and
>
> (3) The petitioning grandparent has been refused visitation with a minor grandchild by the custodial parent for a period of six months or more.
>
> (b) In determining the appropriateness of granting visitation rights to a grandparent pursuant to this section, the court shall consider the amount of personal contact between the grandparent and minor child prior to the filing of the petition, whether or not the granting of visitation would interfere with the parent-child relationship and the overall effect of such visitation on the minor child's best interest.

[must] be deemed the 'noncustodial parent'". *Elmer Jimmy S.* at 268. This Court found that a terminated individual was not a "noncustodial parent", as he was no longer a parent:

> When an individual's parental rights have been terminated, the law no longer recognizes such individual as a "parent" with regard to the child or children involved in the particular termination proceeding. Implicit in the term "noncustodial parent", as used in W.Va. Code Sec. 48-2B-3(a)(1), is the fact that such person is a "parent" to the child in question. Thus, the non-parent whose parental rights have been terminated could not then be deemed a "noncustodial parent".

Id.

Under similar interpretation of identical language here, because Ms. M.'s parental rights have been terminated, she is not a member of the class of individuals entitled to bring a 49-6-6 Motion, as she is not "the child, the child's parent or custodian, or the state department". Because Ms. M. is no longer Cesar's parent, she does not have the right to bring a motion for changed circumstances.[8]

This reading of 49-6-6 does not leave an individual whose rights have been terminated without remedy. First, under Rule 46 of the Rules of Procedure for Child Abuse and Neglect, any "party[] may move to modify or supplement a current order of the court at any time until the time period for appeal has expired". Therefore, as a party,

[8] Counsel is required to note that the issue of the definition of a "legal parent" also played into this Court's decision in *Rebecca Lynn C.* (30411), 213 W.Va. 240, 580 S.E.2d 854 (11/27/2002), opinion withdrawn by and substituted opinion at *Rebecca Lynn C. v. Michael Joseph B.*, 213 W.Va. 744, 584 S.E.2d 600 (2003). These cases involved child support, and in the first opinion, this Court recognized a parent whose parental rights have been terminated is no longer a legal parent to the infant. See, Syllabus Point 3 of the withdrawn opinion, that: "A final order terminating parental rights completely severs the parent-child relationship. . .". This Court quoted decisions from 19 jurisdictions in the body of the opinion in support of this position, with two jurisdictions in opposition. Based on this, the Court found that child support could not be collected from an individual whose parental rights had been terminated. Subsequently, this opinion was withdrawn, and this Court found in the second *Rebecca Lynn C. v. Michael Joseph B.*, and in *In re Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003), that child support could be collected from an individual, even after his parental rights had been terminated. See, FN 12, infra, for more discussion of these cases.

Ms. M. had the right to move to modify the November 30, 2005, Order terminating her parental rights to Cesar, until January 30, 2006[9].

Further, under 49-6-6, the other parties in the case, including D.H.H.R. and the guardian, have the right to ask for a change of disposition for an infant at any time before adoption, if there has been a change of circumstances requiring a different disposition[10]. Thus, a terminated individual would have the right to petition D.H.H.R. and the guardian and ask that one of those entities file a 49-6-6 Motion, if the circumstances warranted this[11]. Finally, an individual who has relinquished parental rights has the right to seek redress through the provisions of West Virginia Code Sec.49-6-7, if there has been fraud, duress, or other legally cognizable fault, in procuring the relinquishment. (See, infra.)

This reading of 49-6-6 is consistent with permanency for an infant, and it comports with the requirements of Rule 2 of the Rules of Procedure for Abuse and Neglect, that the rules are "to be liberally construed to achieve safe, stable, secure and permanent homes for abused and/or neglected children. . .". Any other interpretation allows a terminated individual to repeatedly file 49-6-6 motions, disrupting adoptions and delaying permanency, simply because the individual has changed her mind about the relinquishment. (See, Point III, infra). Here, Ms. M. was given more than a fair chance to remain in Cesar's life, and she was given the chance of an improvement period.

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[9] This is pursuant to the authority of *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827 (1996), that a final order is one that "leaves nothing to be done but to enforce by execution what has been determined". The Order terminating Ms. M.'s parental rights would have been a final, appealable order, which could be modified for 2 months pursuant to Rule 46.

[10] Further, D.H.H.R. and the Guardian can join in a motion made by the terminated individual.

[11] This Guardian has previously participated in and filed 49-6-6 motions on behalf of individuals whose rights have been terminated in certain unusual cases when this was clearly in the best interests of the infants involved. Specifically, this type of situation could arise when there is an older child for whom no other placement is available, and the terminated individual has resolved the issues involved in the termination proceeding. See, infra.

Unfortunately for Ms. M., her incarceration interfered with this plan. It is now simply too late for Ms. M. to claim the right to be involved in Cesar's life[12].

2. MS. M.'S MOTION TO WITHDRAW HER RELINQUISHMENT WAS PROPERLY DENIED, AS MS. M. DID NOT ALLEGE FRAUD, DURESS, OR OTHER LEGALLY COGNIZABLE FAULT WHICH WOULD ALLOW THIS RELIEF.

Ms. M. then sought to have her relinquishment withdrawn, alleging that the relinquishment was the result of duress, as set forth in her affidavit. However, Ms. M. gave no details of the nature of the duress, as was required by the Circuit Court. In fact,

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[12] *In re Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003), is not contrary to this interpretation. This case came before the Supreme Court on the terminated Father's appeal of the circuit court's conclusion that Stephen was abused and neglected, and its subsequent termination of the Father's parental rights, but not his responsibilities, to Stephen. Among the issues appealed, the Father argued that the Circuit Court exceeded its authority by requiring him to pay child support after the termination of parental rights, because the Father no longer had the right to visitation with the Infant; further, he argued that it was inequitable to require him to pay support if the Infant were adopted. *In re Stephen Tyler R.*, at 587, 599, 731, 743, The narrow reading of this case is that an individual whose parental rights have been terminated, but who retains parental responsibilities, still has the right to bring a 49-6-6 motion to modify his child support obligations, if there has been a change of circumstances, as the case makes clear that the Court may terminate either parental rights or parental responsibilities or both. Id. at 740, 596. This is because the individual would qualify under 49-6-6 to file the motion as a parent, concerning continuing parental responsibilities. This case does not say, however, that this individual would have the right to reopen the entire disposition, including the termination of parental rights. What makes the Court's holding unclear in *Stephen Tyler R.*, however, is that it seems to imply that an individual can file a 49-6-6 motion to modify an existing child support obligation after a child has been adopted. However, pursuant to the plain language of 49-6-6, such motion to modify disposition may not be filed after the Infant's adoption. In addition, adoption cuts off any obligation to pay child support; therefore, the 49-6-6 motion would be unnecessary. W.Va. Code Sec. 48-22-703. Further, even if adoption did not have this effect, the individual whose rights, but not his responsibilities, are terminated, has the right to petition for modification of a child support obligation at any time, pursuant to W.Va. Code Sec. 48-11-105, which allows any person obligated to pay child support to move for modification of that obligation. What can be said, however, is that no where in *Stephen Tyler R.* does this Court state that the terminated parent has the right to file the 49-6-6 motion; rather, this Court simply states that such a motion may be filed. Therefore, the question of who may file such a motion is not answered by *Stephen Tyler R.* The reason that this Court may have even considered use of a 49-6-6 motion in *Stephen Tyler R.* was because at the time this decision was published, this Court was wrestling with whether or not child support is owed after termination of parental rights. Compare, *C.v. B., 30411, Rebecca Lynn C., v. Michael Joseph B., Id. (11/27/2002)*, supra at fn 8, in which this Court found that child support could not be ordered after an individual's parental rights were terminated, opinion withdrawn and substituted by *Rebecca Lynn C. v. Michael Joseph B.*, 213 W.Va. 744, 584 S.E.2d 600 (2003), supra at fn 8, in which the Court found that a parent's duty to support a child cannot be waived or contracted away, even with relinquishment of parental rights. The second *Rebecca Lynn C.* decision was published on the same day as *Stephen Tyler R.*, July 1, 2003. Obviously, fairness to a terminated parent requires that child support stop if a child is adopted, and this Court may have seen 49-6-6 as the mechanism to allow this to happen.

the only examples of duress given by Ms. Melbourne was that she was incarcerated at the time that her relinquishment was signed, and that the form was not explained to her by her attorney. This evidence is insufficient to meet the standard of duress that is required under West Virginia law before a relinquishment of parental rights can be withdrawn.

First, Ms. M.'s affidavit is contradicted by her statements in her relinquishment, as paragraph 14 of the document indicates that "I have not been induced, coerced or threatened into signing this document". It is also contradicted by paragraphs 12 and 13 which state, respectively, that "I have read and discussed thoroughly with my attorney all the above mentioned rights", and "I fully understand the meaning and consequences of executing this document". These statements of fact made by Ms. M. are judicial admissions, and she cannot now assert any claims that are inconsistent with them:

> A judicial admission is a statement of fact made by a party in the course of litigation for the purpose of withdrawing the fact from the realm of dispute. [citations omitted]. The significance of such an admission is that it will "stop the one who made it from subsequently asserting any claim inconsistent therewith". [citation omitted].

Wheeling-Pittsburgh Steel Corporation v. Rowing, 205 W.Va. 286, 517 S.E.2d 763 (1999). See, also, *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 (1986), at Syllabus Point 4. Ms. M.'s sworn affidavit, that her relinquishment was not the result of coercion or threat, and that the consequences of relinquishment had been explained to her, are exactly the types of statements of fact which have now been withdrawn from dispute, and which cannot be contradicted by her later affidavit.

However, even assuming, *arguendo*, that Ms. M. could prove the facts contained in her affidavit, these do not equate to the duress required to revoke a relinquishment, as duress:

> . . . means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere "duress of circumstance" does not constitute duress.

State ex rel. L. v. Pancake, 209 W.Va. 188, 192, 544 S.E.2d 403 (2001), Justice Davis, concurring. Further, these facts must be proven to the standard of "clear and convincing evidence". *Pancake*, Id.

This standard was first addressed in *Wooten v. Wallace*, 177 W.Va. 159, 351 S.E.2d 72 (1986), in which this Court recognized that the fact that the mother was an "untrained, divorced, emotionally upset young woman with little prospects for supporting herself, much less [the Infant. . .], other than living in her father's house", was "duress in a general sense". *Wooten* at 161. However, this was insufficient to allow the Mother to revoke her relinquishment of parental rights, and her consent to adoption. The Court reasoned that:

> . . . to the extent that these factors constitute a type of duress, they are not the type of manufactured duress contrived by the adopting parents that the statute contemplates. Were we not to interpret "duress". . . narrowly, almost all adoptions would be subject to challenge. It is difficult to conceive of circumstances in which a natural parent would place a child up for adoption unless the parent's personal circumstances were in some way incompatible with taking care of the child.

Id. In fact, this Court found that the "duress" required

> implies something more than a natural parent's personal circumstances which, at the time the consent to adopt is executed, make it more reasonable to put a child up for adoption than for the parent to raise the child herself.

Id. at 160. Thus, "duress of circumstances" is insufficient to allow revocation of consent to adopt, and the duress required must be an act by the adopting parent which is either unlawful, or "so egregious as to be unconscionable." Id.

The Supreme Court reaffirmed this holding in *Baby Boy R. by Patricia R. v. Velas*, 182 W.Va. 182, 386 S.E.2d 839 (1989). In this case, the mother sought to withdraw a relinquishment of parental rights procured by D.H.H.R. The Court again found that the duress which allows revocation of a relinquishment must be "a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child". Id at Syllabus Point 2. In *Baby Boy R.*, the Court found that there had been no manipulation by D.H.H.R., and that "any duress that existed was that of circumstances rather than fraud or manipulation". Id. at 186.

In the current case, Ms. M. points to no unlawful or unconscionable act by any individual, including her attorney, which induced or procured her relinquishment of parental rights. Rather, she can say no more than that there was duress of circumstances here; that because she was incarcerated, she could not take care of this Infant. This is insufficient to allow revocation of a relinquishment.

Ms. M. also argues that as she was incarcerated at the time that her relinquishment document was signed, a guardian *ad litem* should have been appointed in addition to her attorney to represent her in this matter. However, Ms. M.'s counsel never asked for appointment of a guardian *ad litem* for the Ms. M., and Ms. M. never expressed dissatisfaction with her counsel, until she sought to reopen her relinquishment. Therefore, this issue was waived by Ms. M.

However, even if it were not waived, appointment of a guardian *ad litem* was not required, as Ms. M. was given appointed counsel at the beginning of this case, and subsequently became incarcerated. A guardian *ad litem* is not necessary when an

incarcerated convict is already represented by a representative. See, Rule 17(c) of the West Virginia Rules of Civil Procedure, that, "[a] . . . convict who does not have a duly appointed representative may sue by a next friend or by guardian *ad litem*." See, also, *Craigo v. Marshall*, 175 W.Va. 72, 75, 331 S.E.2d 510 (1985), that:

> In the case of a prisoner bringing his own suit, it is possible to conclude that he has elected to waive the use of a committee, next friend, or guardian. . .We. . . conclude that a different rule should obtain where a prisoner is sued. In the absence of an express written waiver of his right to a committee under W.Va. Code, 28-5-36, or a guardian *ad litem* under Rule 17(c) of the West Virginia Rules of Civil Procedure, such a suit cannot be directly maintained against the prisoner.

Obviously, under the express language of Rule 17(c) and *Craigo*, a convict may only be sued through his representative, such as his "general guardian, curator, committee, conservator, or other like fiduciary". However, a guardian *ad litem* does not need to be appointed when the convict is already represented by a fiduciary. Therefore, the Circuit Court did not err by refusing to reopen Ms. M.'s relinquishment because she did not have a guardian *ad litem*.

Based thereon, because there was no duress here, the Mother's 49-6-7 Motion to withdraw her relinquishment was properly denied.

3. THE CIRCUIT COURT CORRECTLY INTERPRETED THE RELEVANT STATUTES *IN PARI MATERIA*, ALLOWING THE LEGISLATURE'S INTENTION TO BE FOLLOWED HERE.

In its decision *sub judice* , the Circuit Court correctly interpreted the relevant statutes in a manner consistent with the Legislature's intention.[13] The word "parent" is

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[13] The cardinal rule of statutory interpretation is to first identify the legislative intent expressed in the promulgation at issue. To this end, we have recognized that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the legislature". [citation omitted]. We next scrutinize the specific language employed in the enactment. "A statutory provision that is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts, but will be given full force and effect." [citations omitted].

undefined in W.Va. Code Sec. 49-6-1, et seq. Therefore, this word must be given its "common, ordinary and accepted meaning, in the connection in which it is used".[14] The plain meaning of the word "parent" as used in W.Va. Code 49-6-6 does not include an individual whose rights as a parent have been terminated.

This conclusion is bolstered by the Legislature's use of the words "natural parent" in 49-6-7, that "an agreement of a natural parent in termination of parental rights shall be valid. . .[if] free from duress and fraud". By using the adjective "natural" before the noun "parent" in 49-6-7, the Legislature intended that an individual with the biological relationship of parent would have the right to have such a relinquishment revoked, if tainted by fraud or duress. This adjective is not included in 49-6-6, however, showing that the Legislature did not intend to give standing to file a 49-6-6 motion based on the same biological relationship. Both of these statutes were passed in 2001.

This whole area of the law also has to be interpreted pursuant to this Court's repeated admonition that the polar star of abuse and neglect proceedings is the best

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> Where, however, the statute's terms are less clear, statutory construction, rather than strict application, is appropriate. In such instances, "[j]udicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain legislative intent. [citations omitted]. . . Furthermore, statutory construction is necessary to ascertain the meaning of undefined words and phrases. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." [citations omitted].

In re Clifford K., 217 W.Va. 625, 633, 619 S.E.2d 138 (2005).

[14] The word "parent" is defined differently in other sections of the Code. For example, under W.Va. Code Sec. 16-30-3(r), definitions relating to the West Virginia Health Care Decisions Act, a "parent" means a person who is another person's natural or adoptive mother or father or who has been granted parental rights by a valid court order and whose parental rights have not been terminated by a court of law". In contrast, under W.Va. Cod Sec. 48-1-235.1, a "parent" means a legal parent as defined in section 1-232." In that section, a "legal parent means an individual defined as a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds". Under this section, a person whose rights are terminated might be included in the definition of a "legal parent".

interests and welfare of the Infant, and that an Infant has the right to permanency in the time frames laid out by statutes and rules. In this regards, this Court has held that:

> . . . [the] need for rapid finality in abuse and neglect proceedings is attributable to the overriding concern for the subject child's welfare. '[A] child deserves resolution and permanency in his or her life. . . (citation omitted).'

In re Michael Ray T., 206 W.Va. 434, 442, 525 S.E.2d 315 (1999). This Court has also found that "the preeminent concern in abuse and neglect proceedings is the best interests of the child(ren) subject thereto and the speedy resolution thereof. . .". *In re Stephen Tyler R.*, 214 W.Va. 725, 733, 584 S.E.2d 581 (2003). This is because, "unjustified procedural delays wreak havoc on a child's development, stability and security". Id., quoting Syllabus Point 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). Further, ". . . children have a right to resolution of their life situations, to a basic level of nurturance, protection and security, and to a permanent placement". *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 157, 470 S.E.2d 205 (1996). This need for prompt resolution has been found to be "a mandate imposed by the Legislature. . .

> The clear import of the statute. . .is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

In re Michael Ray T., id.

With this in mind, it does not make sense to include individuals whose rights have been terminated within the definition of a "parent" in the context of 49-6-6. This is because the statutory scheme set forth in 49-6-1, et seq., lays out specific and timely procedures to determine whether abuse and neglect of a child has occurred, and thereafter whether parents should be given a chance to improve their situation or if parental rights should be terminated. See, general 49-6-1 through 49-6-5 and 49-6-12. However, at a

certain point , an individual's quest to retain parental rights ends, and his status as a "parent" is severed, either because he has been unsuccessful in his improvement period; because he has relinquished parental rights; or because his parental rights have been terminated by the circuit court. Thereafter, the individual has two months to file for modification of the circuit court's order under Rule 46 of the Rules of Procedure for Child Abuse and Neglect, or to file his petition for appeal under Rule 49. An extension of the appeal may be granted for an additional two months, but only "upon a showing of extraordinary circumstances". Rule 49.

At the end of these time periods, the individual looses his right to be involved in any aspect of the child's life[15], and he also looses his right to petition for readmission into the child's life. If this were not so, the individual whose rights were terminated could repeatedly file 49-6-6 motions, asking for a change of disposition and forever delaying adoptions and permanency for the Infant. This simply does not make sense under the statutory scheme, which recognizes that permanency and finality are in the best interests of the child.

Rather, in reading the scheme set out in 49-6-1, et seq., in *pari materia*, it is clear that the only individuals who can ask for a change of disposition under 49-6-6 are the Infant, the Infant's custodian, D.H.H.R., or those who retain parental rights. The "natural parent" whose rights are terminated through a relinquishment still has the right to petition for redress under 49-6-7, if the relinquishment were obtained through duress and fraud. However, the individual whose rights are terminated has no right to ask that the circuit court reopen his case under 49-6-6, simply because his circumstances have changed.

[15] The only exception is if the individual is granted post termination visitation pursuant to Rule 15 of the Rules of Procedure.

VI. CONCLUSION

Tameka M. argues that the decision to deny a terminated individual the right to bring a 49-6-6 Motion cuts off options that should be available for an abused infant, and that this position denies children the possibility of reestablishing a relationship with a parent who has actually turned his life around, due to the technicality of termination of parental rights by voluntary relinquishment".[16] This position is incorrect, however, because if such an individual has actually resolved the issues that led to the termination, and if another good permanency plan for the child has not been found, any other party, including the child, the child's guardian, a parent whose rights have not been terminated, or D.H.H.R., has the right to bring or join in the 49-6-6 motion. Thus, the possibility of reestablishing a relationship is not denied to the child, if this is truly in his best interests.

This Guardian does believe that there are rare times when an individual whose rights have been terminated should be reconsidered for placement or other contact with a child. This occurs when adoption or other placement options cannot be found, particularly for an older or troubled child, and when the individual can show that she has resolved the issues that resulted in the termination. This Guardian has filed and joined in such motions in the past, and has even argued that parental rights should be reinstated, after careful consideration of the circumstances of both the child and the individual whose rights were terminated.

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[16] This Guardian believes that Tameka M. does not understand that this ruling applies equally to any individual whose rights have been terminated, and who seeks to file a 49-6-6 Motion, whether the termination is due to court action or to voluntary relinquishment. These two classes of individuals should not be treated differently under 49-6-6. The person who relinquishes has the option, however, of showing that the relinquishment was procured by fraud or duress, under 49-6-7. This is not available to the individual whose rights are terminated by court action.

However, Tameka M.'s position here does not facilitate this rare and careful consideration. Rather, under Tameka M.'s position, any terminated individual can bring a 49-6-6 motion at any time before adoption, simply by alleging a change of her own circumstances. The result is not the child-driven inquiry of what is in the best interests of the child. Rather, the circuit courts are put in the position of having to consider the terminated individual's motion, even if there is no good cause for the same, with the result being the delay of the child's adoption and other permanency plan. This is just what has occurred here with Ms. M.'s Motion.

Based thereon, it is respectfully requested that Tameka M.'s Appeal be dismissed, and that the Circuit Court's Order be upheld.

Respectfully submitted

Margaret B. Gordon, Esquire
Guardian *ad litem*

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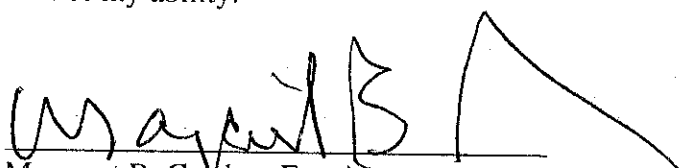
VII. COUNSEL'S RULE 4(A) CERTIFICATION

Comes now Margaret B. Gordon, Guardian *ad litem* herein, and does hereby certify, pursuant to Rule 4(A) of the West Virginia Rules of Appellate Procedure that the facts alleged herein are faithfully represented and that they are accurately presented to the best of my ability.



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CERTIFICATE OF SERVICE

Type of Service: United States First-Class, Postage Prepaid Mail

Date of Service: April 13, 2007

Persons Served:

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Berkeley County Prosecutor
Berkeley County Judicial Center
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308 South Queen St.
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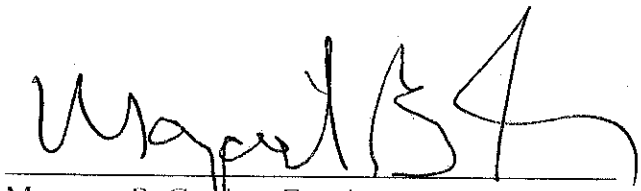
Items Served: Guardian *ad litem's* Opposition To Tameka M.'s Request for Modification of Disposition



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